No. 97-9361

In The

Supreme Court of the United States

October Term, 1998

LOUIS JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would result in a court-imposed sentence less severe than life imprisonment.

2. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation would result in a court-imposed sentence of life imprisonment without possibility of release.

3. Whether the court of appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt.

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2. Louis Jones, Jr.

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OPINION BELOW

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JURISDICTION

The judgment and opinion of the Court of Appeals were issued on January 5, 1998. (J.A. 82-123, 124). Petitioner's timely petition for rehearing was denied on March 4, 1998. (J.A. 125). The petition for a writ of certiorari was filed on June 2, 1998 and was granted on October 5, 1998. (J.A. 126). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

18 U.S.C. § 1201(a), the federal kidnapping statute under which petitioner was prosecuted, is set out in Appendix A to this Brief. The Federal Death Penalty Act of 1994 ("FDPA"), 18 U.S.C. §§ 3591-98, is set out in Appendix B to this Brief.

STATEMENT

A. Statutory Background

This case was the first tried under the Federal Death Penalty Act of 1994 ("FDPA"), which sets forth procedures to be followed where the government seeks the death penalty for an offense which is potentially punishable by death. First, "a reasonable time before the trial,"

the government must file a written notice of its intent to seek the death penalty, in which it "set[s] forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death." 18 U.S.C. § 3593(a).

For homicide cases, these aggravating factors are drawn from a list of sixteen statutory aggravating factors set forth in 18 U.S.C. § 3592(c). In addition to these sixteen factors, however, the government is empowered to charge and submit nonstatutory aggravating factors, under the last sentence of 18 U.S.C. § 3592(c), which provides that "[t]he jury . . . may consider whether any other aggravating factor for which notice has been given exists."

At a sentencing hearing held before the jury that determined the defendant's guilt, *see* 18 U.S.C. § 3593(b), the government presents information in support of the aggravating factors which it has charged, and the defendant presents information in support of any mitigating factors.[1] Aggravating factors must be proved beyond a reasonable doubt; mitigating factors must be proved only by a preponderance of the evidence. *See* 18 U.S.C. § 3593(c).

After the presentation of evidence, the jury is first required to determine beyond a reasonable doubt whether the defendant possessed one of the requisite threshold mental states described in 18 U.S.C. § 3591(a)(2)(A)-(D).[2] In the case of a positive finding, the

[1] These mitigating factors may be those specifically enumerated in 18 U.S.C. § 3592(a)(1)-(7), or they may be "other factors in the defendant's background, record or character or any other circumstance of the offense that mitigate against imposition of the death sentence." 18 U.S.C. § 3592(a)(8).

[2] These threshold mental states are designed to ensure that a defendant is not sentenced to death in violation of the

jury next determines which of the noticed aggravating factors and which mitigating factors have been proved. "A finding with respect to any aggravating factor must be unanimous"; however, "a finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established." 18 U.S.C. § 3593(d).

If the jury unanimously finds that one of the noticed statutory aggravating factors has been proved beyond a reasonable doubt,

> the jury . . . shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

18 U.S.C. § 3593(e). The FDPA is thus what the Court has termed a "weighing" statute. *Cf. Stringer v. Black*, 503 U.S. 222, 229 (1992).

"Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum

teachings of the Court in *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987).

term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release." 18 U.S.C. § 3594.

Finally, the FDPA provides for detailed appellate review of death sentences returned thereunder. *See* 18 U.S.C. § 3595.

B. Facts Leading to Indictment

On February 18, 1995, petitioner's ex-wife, Sandra ("Sandy") Lane made a final break with petitioner, informing him that there was no chance that they could ever have a future together. After many hours of replaying a tape recording of this conversation and drinking a large quantity of alcohol, petitioner went in search of Lane at Goodfellow Air Force Base, in San Angelo, Texas, where he believed she might be on duty. Unfortunately, he found Tracie McBride, a 19 year old white female private, who bore a strong physical resemblance to Lane.

Petitioner kidnapped McBride and took her to his residence in San Angelo.[3] In the early morning hours of February 19, 1995, he drove McBride to a remote location, where he struck her over the head several times with a tire iron, killing her.

Two weeks later, after being taken into custody on an alleged prior assault of his ex-wife, petitioner admitted that he was the black male who was seen abducting McBride and that he had killed her. Petitioner then voluntarily led law enforcement authorities to the location of McBride's body. An autopsy revealed injuries consistent with sexual assault and concluded that the cause of McBride's death was blunt force trauma to the head.

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[3] While in the process of abducting McBride, petitioner also assaulted one Private Michael Peacock, who was attempting to foil the abduction.

C. Trial, Sentencing, and Appeal

On March 7, 1995, petitioner was indicted for kidnapping resulting in the death of Tracie McBride, 18 U.S.C. §§ 7(3) and 1201(a)(2) (a potentially capital offense); and assault of Michael Alan Peacock, resulting in serious bodily injury. 18 U.S.C. §§ 7(3) and 113(f). (J.A. 5-6). Before trial, the government gave notice of its intention to seek the death penalty. (J.A 7-12). In that notice, the government alleged four statutory aggravating factors[4] and three nonstatutory aggravating factors[5] in support of its request for the death penalty.

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[4] These factors were submitted to the jury as follows:

2(A). The defendant LOUIS JONES caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping.

2(B). The defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, Tracie Joy McBride.

2(C). The defendant LOUIS JONES committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride.

2(D). The defendant LOUIS JONES committed the killing of Tracie Joy McBride after substantial planning and premeditation to cause the death of Tracie Joy McBride. (J.A. 51-52).

[5] These factors were submitted to the jury as follows:

3(A). The defendant constitutes a future danger to the lives and safety of other persons as evidenced by specific acts of violence by the defendant LOUIS JONES.

3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.

3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense. (J.A. 53).

At the sentencing hearing which followed petitioner's conviction on the two charged offenses, the government first presented its case on aggravation, which included (in addition to the evidence of the offense presented during the guilt/innocence phase): a workplace assault allegedly committed by petitioner in 1970; petitioner's alleged physical and sexual assaults of his ex-wife Sandy Lane; the medical examiner's testimony about the force of the trauma to Tracie McBride's skull; and testimony about Tracie McBride by her mother, Irene McBride.

In mitigation, the defense showed that petitioner had overcome a childhood background of severe physical and sexual abuse and neglect to become a successful noncommissioned officer in the United States Army. During his 22 year Army career, petitioner served with distinction in the Airborne Rangers in both the Grenada invasion and the Gulf War. Petitioner rose through the ranks and was decorated several times.

Petitioner retired from the Army in 1993 in order to be together with his then-wife Sandy Lane, an Army drill instructor. The evidence presented at sentencing showed that this termination of his successful military career proved disastrous. Petitioner made a series of failed attempts to go back to college, and found himself working in minimum wage jobs which were inadequate to support his family. This sudden decline in petitioner's fortunes took its toll on his marriage, and eventually destroyed it altogether.

The defense presented expert psychiatric and psychological testimony to show that petitioner's ability to control his impulses and to act rationally had, on the date of the offense, been severely compromised.[6] The final

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[6] Testimony showed that petitioner suffered from impairment of the frontal lobe of the brain, the part of the brain attributed with rational decisionmaking and impulse control.

break with his ex-wife on February 18, 1995 became the trigger which – coupled with petitioner's childhood sexual and physical abuse, posttraumatic stress disorder from witnessing killings during combat in Grenada and from stressful combat conditions during the Gulf War with numerous physical manifestations, numerous severe head injuries, and the loss of the organizing structure of the Army – led to petitioner's violent actions. In rebuttal, the government presented several expert witnesses who disputed petitioner's claims of brain dysfunction and psychiatric problems.

Before the case was submitted to the jury, the defense realized that the instructions which the District Court proposed to give conveyed the erroneous and highly prejudicial impression that jury deadlock as to the penalty would result in a court-imposed sentence of **less than** life imprisonment. In relevant part, these instructions were as follows:

> In determining whether a sentence of death is appropriate, you must weigh any aggravating factors that you unanimously find to exist – whether statutory or nonstatutory – against any mitigating factors that any of you find to exist. * * * **Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.**
>
> If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. * * *

If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. **In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.**

* * *

In order to bring back a verdict recommending the punishment of death or life without possibility of release, all twelve of you must unanimously vote in favor of such specific penalty.

* * *

As you retire to begin your deliberations, you will be provided with a form entitled "Special Findings" on which you should record your determinations as to the existence or non-existence of any aggravating factor. You will also be provided with four forms entitled "Decision Form A, B, C, and D" on which you will record your decision regarding your sentencing recommendation. The forms are self-explanatory: Decision Form A should be used if you determine that a sentence of death should not be imposed because the government failed to prove beyond a reasonable doubt the existence of the

required intent on the part of the defendant or a required aggravating factor. **Decision Form B should be used if you unanimously recommend that a sentence of death should be imposed. Decision Form C or Decision Form D should be used if you determine that a sentence of death should not be imposed because:** (1) you do not **unanimously** find that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist; or (2) you do not **unanimously** find that the aggravating factor or factors found to exist are themselves sufficient to justify a sentence of death where no mitigating factor has been found to exist; or (3) regardless of your findings with respect to aggravating and mitigating factors you are not **unanimous** in recommending that a sentence of death should be imposed. **Decision Form C should be used if you unanimously recommend that a sentence of imprisonment for life without the possibility of release should be imposed. Decision Form D should be used if you recommend that some other lesser sentence should be imposed.** (J.A. 43-45, 47-48) (emphasis added).

Petitioner sought to correct the potential misunderstanding he had identified by requesting an instruction that, if the jury could not unanimously agree whether petitioner should be sentenced to death or life imprisonment, but did agree that he should receive one or the other, he would be sentenced to a term of life imprisonment without the possibility of parole or release. Particularly, in his Requested Jury Instruction No. 5, petitioner requested that the jury be instructed as follows:

> In this phase, I instruct you that unanimity beyond a reasonable doubt is required for you to sentence Louis Jones to death. But if any of you – even a single juror – is not persuaded

beyond a reasonable doubt that Mr. Jones' execution is required in this case, then the entire jury must render a decision against his death. In that event, the jury must fix his punishment at life in prison without any possibility of release.

Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. **In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release.** In short, if you find that you are not unanimous in your views, you have reached a decision: namely, that the government has not met its burden of proof as to the death penalty.

> **In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release.** (J.A. 14-15) (emphasis added).

However, the District Court refused to give this instruction. (J.A. 30, 33).

After a day and a half of deliberations, the jury returned its sentencing verdict along with its special findings as to the aggravating and mitigating factors. (J.A. 50-59). The jury did not find two of the statutory aggravating factors submitted: 2(B) (that petitioner caused a grave risk of death to another person) and 2(D) (that petitioner committed the killing after substantial planning and premeditation). The jury did find the other two statutory aggravating factors – 2(A) (that petitioner

caused the death of McBride, or injury resulting in her death, in the commission of the kidnapping) and 2(C) (that petitioner committed the offense in a heinous, cruel, and depraved manner) – had been proved beyond a reasonable doubt.

The jury did not find nonstatutory aggravating factor 3(A) (that petitioner constituted a future danger to the lives and safety of other persons). The jury did find the other two nonstatutory aggravating factors, 3(B) (Tracie McBride's young age, slight stature, background, and unfamiliarity with San Angelo, Texas), and 3(C) (Tracie McBride's personal characteristics and the effect of the instant offense on her family).

The jury found all ten of the specific mitigating factors submitted by petitioner.[7] Additionally, seven jurors

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[7] These mitigating factors, along with the number of jurors finding these factors (in parentheses), were as follows:

1. That petitioner did not have a significant prior criminal record (6);

2. That petitioner's capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of the law was significantly impaired (2);

3. That petitioner committed the offense under severe mental or emotional disturbance (1);

4. That petitioner was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed) (4);

5. That petitioner served his country well in Desert Storm, Grenada, and for 22 years in the United States Army (8);

6. That petitioner is likely to be a well-behaved inmate (3);

7. That petitioner is remorseful for the crime he committed (4);

8. That petitioner's daughter will be harmed by the emotional trauma of her father's execution (9);

"wrote in" "Sandy Lane" – petitioner's ex-wife – as a mitigating circumstance. (J.A. 56). Nevertheless, the jury returned a verdict of death. (J.A. 57-58).

Petitioner filed a timely motion for new trial specifically urging that the jury's "critical misunderstanding" of the consequences of nonunanimity in the sentencing verdict directly resulted in the verdict of death. (J.A. 60-68). Petitioner argued that "the fear that the court could impose a sentence of less than life without possibility of release if there was not a unanimous verdict was improperly used as leverage in overcoming the scruples of those jurors who reasonably felt that the appropriate punishment was life without release." (J.A. 62). Petitioner noted that his Requested Instruction No. 5 would have cured this error. (J.A. 62).

Petitioner attached an affidavit detailing a post-verdict interview conducted with juror Christie Beauregard, who had contacted the defense on her own initiative.[8] (J.A. 66-68). Ms. Beauregard stated that "[d]uring deliberations, it was her impression that other jurors expressed an opinion that the result of a jury unable to reach a verdict between life without possibility of release and a death sentence would be that the court would impose a lesser sentence." (J.A. 66). "She stated that there was considerable pressure in deliberations to prevent that

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9. That petitioner was under unusual and substantially internally generated duress and stress at the time of the offense (3); and

10. That petitioner suffered from numerous neurological or psychological disorders at the time of the offense (1). (J.A. 54-56).

[8] In fact, the attorneys were forbidden, by local rule, from initiating any contact with the jurors. Ms. Beauregard spoke with defense attorney Carlton McLarty and defense investigator Daniel Salazar, and thereafter Mr. Salazar executed an affidavit detailing what Ms. Beauregard had said.

outcome." (J.A. 67). "She described the situation where they thought they would either have a hung jury or the Judge would impose a lesser sentence in the event of a hung jury. No one wanted to have Louis Jones receive a lesser sentence than life without possibility of release." (J.A. 67). Finally, "[s]he sa[id] that if the jury had known that if they were unable to reach a verdict between life without possibility of release and death that the Judge would have imposed a life without possibility of release sentence then she would not have agreed to vote for a death sentence. She believed other jurors shared that view." (J.A. 68). The District Court, however, denied petitioner's motion for new trial. (J.A. 74).

Petitioner filed a motion asking the District Court to reconsider its denial of his motion for new trial. (J.A. 75-80). Petitioner again urged that "[t]he jury thus sentenced the defendant to death based on the erroneous belief that failure to agree on a verdict could result in the imposition of a 'lesser sentence' that would result in the defendant's release from prison." (J.A. 76). Petitioner argued that he was "harmed by unwarranted speculation regarding his possible release." (J.A. 76).

Petitioner attached the affidavit of juror Cassandra Hastings, who had also initiated contact with defense counsel. (J.A. 78-80). Ms. Hastings's account of juror confusion dovetailed with that of Ms. Beauregard. Ms. Hastings stated that "[i]nitially, no one knew exactly what would happen if we were unable to reach a verdict." (J.A. 78). She stated that when "[i]t looked like we might have a hung jury[, a]t this point we again discussed the effect of a hung jury." (J.A. 79).

Ms. Hastings then stated that "[o]ne of the men [jurors] . . . said that if we had a hung jury then the sentence would be left up to the judge and that Louis Jones would get the lesser sentence referred to in the last jury verdict form. People then brought up the possibility that Mr. Jones could be released from prison. No one

wanted this to happen or even be possible." (J.A. 79). Like Ms. Beauregard, Ms. Hastings stated that she would not have changed her vote from life without release to death had she known that a hung jury would not result in a "lesser sentence" leading to petitioner's ultimate release from prison. (J.A. 79).

The District Court, however, denied petitioner's motion to reconsider. (J.A. 81).

Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit. That court affirmed the judgment of conviction and sentence of death (J.A. 82-123, 124), and denied petitioner's timely petition for rehearing. (J.A. 125).

SUMMARY OF ARGUMENT

I. Under 18 U.S.C. § 1201(a), petitioner faced a sentence of either "death or life imprisonment" for the kidnapping of Tracie McBride. Under federal law, a sentence of life imprisonment carries no possibility of parole or release. Unfortunately, there was **at least** a "reasonable likelihood" that the jury erroneously believed that failure to agree on a penalty recommendation of death or life imprisonment without release would result in the imposition of "some other lesser sentence" by the court.

First, the instructions gave the impression that, if the jury failed to unanimously agree on a sentence of death or life without release, it would then become the court's responsibility to assess sentence; and that court-imposed sentence would be a "lesser sentence." Second, and even worse, the instructions and the verdict forms suggested that, if the jury failed to agree on a sentence of death or life without release, it should so indicate by selecting Decision Form D, the verdict form for the "lesser sentence" option.

In fact, there was more than a reasonable likelihood of misinterpretation. As detailed in two affidavits filed of

record, two jurors have stated that the jury **actually** misinterpreted the instructions in the fashion just described. Even without those affidavits, however, it is clear that it is at least reasonably likely that the jurors erroneously interpreted the jury instructions and verdict forms in the fashion discussed here.

The possibility that the jury returned a recommendation of death under an erroneous interpretation of the jury instructions constitutes an "arbitrary factor" requiring reversal under 18 U.S.C. § 3595 of the FDPA. Reversal is likewise required either under the error correction prong of § 3595 or, alternatively, in the Court's capacity as supervisor of the lower federal courts, especially since, in federal death cases, "doubts such as those presented here should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948). Finally, petitioner's sentence also violates the Eighth Amendment's prohibition of death sentences returned on the basis of inaccurate information, as well as the Fifth Amendment's corresponding due process prohibition of sentences based on materially false information.

II. The District Court erred in denying petitioner a jury instruction that the result of jury deadlock on the sentencing recommendation would be a court-imposed sentence of life without release. The plain language of 18 U.S.C. § 3594 requires that, unless the jury unanimously recommends a sentence of death or life imprisonment without the possibility of release, the duty of sentencing devolves upon the court. The legislative history of the FDPA confirms this interpretation. The only option for such court-sentencing in this case would have been the alternative sentence of life imprisonment without the possibility of parole or release.

The requirement that death sentences not be imposed under the influence of any "arbitrary factor" requires that juries be affirmatively and correctly instructed as to all the sentencing options, including the consequences of

jury deadlock, so that the jury will not impose the death penalty based on its speculation about what will happen in the event of a deadlock. Moreover, failure to give the requested instruction exacerbated the error created by the misleading instructions, and requires correction under the "arbitrary factor" review of the FDPA, the error correction prong of the FDPA, or simply in the exercise of the Court's role as overseer of the lower federal courts.

Finally, the Eighth Amendment's proscription of arbitrary and capricious death sentences requires that capital sentencing juries be informed as to the consequences of nonunanimity. Moreover, the failure to give the instruction in the instant case exacerbated the problem of the erroneous jury instructions actually given, and resulted in a death sentence imposed on the basis of inaccurate information in violation of both the Eighth Amendment and the Fifth Amendment Due Process Clause.

III. The Court of Appeals held that the trial court submitted two invalid aggravating factors to the jury at the sentencing phase of the trial, but nonetheless affirmed the death sentence on the grounds of harmless error. The FDPA allows such a conclusion only where the government proves the error was harmless beyond a reasonable doubt. The purported "harmless error" analysis of the Court of Appeals, however, is simply a bare assertion lacking any analysis or explanation indicating how it reached that conclusion. The court made no explanation based upon the record as to why it was convinced beyond a reasonable doubt that the jury would have reached the same sentence absent the invalid aggravating factors. Most significantly, the Court of Appeals' opinion is completely silent with respect to the particulars of the mitigating evidence offered by petitioner and the eleven mitigating factors found by the jurors. Because the court's cryptic conclusion did not provide petitioner with an individualized determination of his sentence, the judgment of the Court of Appeals must be reversed.

ARGUMENT

I. THERE WAS AT LEAST A REASONABLE LIKELIHOOD THAT THE JURY INSTRUCTIONS AND VERDICT FORMS LED THE JURY TO BELIEVE THAT DEADLOCK ON THE PENALTY RECOMMENDATION WOULD RESULT IN A COURT-IMPOSED SENTENCE LESS SEVERE THAN LIFE IMPRISONMENT.[9]

A. Introduction

Once the jury returned its verdict of guilty on the kidnapping charge against petitioner, there were only two possible sentencing outcomes: death, or life imprisonment without release or parole. The statute under which petitioner was convicted provides that one who commits a kidnapping "shall be punished by imprisonment for any term of years or for life and, if **death results, shall be punished by death or life imprisonment.**" 18 U.S.C. § 1201(a) (emphasis added).

In the trial as to guilt/innocence, the jurors were instructed that, in order to convict petitioner of the crime charged, they had to find, beyond a reasonable doubt, "[t]hat the death of Tracie Joy McBride resulted [from the kidnapping]." (Ct. App. Rec. Vol. 6, p. 1060). Thus, the jury's verdict of guilty represented a finding, beyond a reasonable doubt, of "death result[ing]," thereby limiting the possible punishments to either death or life imprisonment. Moreover, because parole has been abolished in the federal system,[10] and because a person subject to a life

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[9] This argument addresses the second question as to which the Court granted certiorari in this case. A decision for petitioner on the second question presented would obviate the need for the Court to decide the first question presented, and the potentially far-reaching sub-issues it raises. Therefore, petitioner has chosen to address Question 2 before Question 1.

[10] *See* Pub. L. 98-473, tit. II, ch. II, § 218(a)(5) (1984).

sentence is not eligible to receive "good time,"[11] "life imprisonment" means that the person will never be released. Therefore, as the jury went into the sentencing hearing, there were only two options: death, or life imprisonment which was, perforce, without the possibility of parole or release.

Unfortunately, the jury instructions and verdict forms (J.A. 34-49, 50-59) gave the jurors the erroneous impression that, if they could not unanimously agree on a sentencing recommendation of death or life without the possibility of release, the duty of sentencing would devolve upon the court, which would then impose some unspecified "lesser sentence."

B. The Court of Appeals Erred in Holding that There Was No Reasonable Likelihood that the Jury Instructions and Verdict Forms Submitted to the Jury Misled the Jury.[12]

It is very important to be clear on exactly what is at issue here, and what is not. The issue is **not** whether it

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[11] *See* 18 U.S.C. § 3624(b)(1).

[12] Where a state criminal defendant makes a claim that an instruction is ambiguous and subject to an erroneous interpretation which violates some federal constitutional right, the Court "inquire[s] 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (footnote omitted), *quoting Boyde v. California*, 494 U.S. 370, 380 (1990). However, because this is a federal case, with the Court sitting in review of the decision of a court of appeals on direct review, the Court's review of the instructions includes also review for nonconstitutional error cognizable in the Court's role as supervisor of the lower federal courts. The standard for reversal of nonconstitutional instructional errors in a federal case – especially a federal capital case – is at least arguably not so stringent as the "reasonable likelihood" standard of *Boyde* and *Estelle v. McGuire*. *See, e.g., Andres v. United States*, 333 U.S. 740, 752 (1948) (finding reversible instructional error in federal capital case where "the jury might reasonably conclude" that erroneous interpretation of instructions was the proper one, and noting that "[i]n death cases doubts such as those presented here should be resolved in favor of the accused"). Nevertheless, the Court need not resolve the standard of review issue here, because even the "reasonable likelihood" standard is easily satisfied under the circumstances of this case.

was error to inform the jury that there was a "lesser sentence" option that in fact did not exist.[13] Rather, the issue is whether the jury instructions and verdict forms could have led a reasonable jury to believe that the court would impose a sentence less than life imprisonment if the jury failed to reach a unanimous verdict.[14]

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[13] With respect to this point, the Court of Appeals, finding that "[t]he defendant did not object to the inclusion of the 'lesser sentence' option below," reviewed only for plain error. (J.A. 107). The Court of Appeals agreed with petitioner that, because petitioner could not possibly receive any sentence less than life imprisonment without possibility of parole or release, it was error to submit the "lesser sentence" option to the jury for its consideration. (J.A. 110). However, the Court of Appeals held that the error was not "plain," because "[p]rior to this appeal, the death penalty sentencing provisions under which Jones was sentenced had never been reviewed on appeal," and thus "[n]o clearly established law answered the question" whether the "lesser sentence" option was unavailable where the substantive statute provided only for death or life imprisonment. (J.A. 110-111).

[14] This issue was properly preserved for review by petitioner's rejected request for a jury instruction on the consequences of jury nonunanimity. Even if that were not true, however, the issue was also preserved by being raised in both a timely motion for new trial (J.A. 60-68) and a motion to reconsider (J.A. 75-80). The Court of Appeals did not consider the issue forfeited, but rather reviewed it on the merits. Under these circumstances, the issue is properly before the Court. *See Leary v. United States*, 395 U.S. 6, 32 (1969) (even where

Analyzing the instructions given to the jury, the Court of Appeals concluded that "the instructions could not have led a reasonable jury to conclude that non-unanimity would result in the imposition of a lesser sentence." (J.A. 102). The Court of Appeals conceded that "the verdict forms standing alone could have persuaded a jury to conclude that unanimity was not required for the lesser sentence option"; but then held that "any confusion created by the verdict forms was clarified in light of the entire jury instruction."[15] (J.A. 102-103). The Court of Appeals also refused to consider the juror affidavits. (J.A. 104-106).

Contrary to the holding of the Court of Appeals, there was **at least** a "reasonable likelihood" that the instructions and the verdict forms gave the jury the extremely prejudicial impression that a lack of unanimity as to either death or life without release would result in the court's imposition of a "lesser sentence." This occurred in two separate, though related, ways. First, the instructions gave the impression that, if the jury failed to unanimously agree on a sentence of death or life without release, it would then become the court's responsibility to assess sentence; and that court-imposed sentence would be a "lesser sentence." Second, and even worse, the instructions and the verdict forms suggested that, if the

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petitioner did not object to jury instructions on the basis of an allegedly unconstitutional presumption, issue was properly before the Court where raised in a motion for a directed verdict and in a motion for new trial, and where court of appeals considered issue on the merits). Finally, as discussed at footnote 22, *infra*, the FDPA's mandated appellate review for "passion, prejudice, or any other arbitrary factor" would require review of petitioner's claim even if there had been no objection at all.

[15] Because the Court of Appeals found that petitioner did not object to the format of the verdict forms, it reviewed these only for plain error. (J.A. 102).

jury failed to agree on a sentence of death or life without release, it should so indicate by selecting Decision Form D, the verdict form for the "lesser sentence" option.

Immediately after twice referring to the jury's ability to recommend a "lesser sentence" (J.A. 43, 44), the District Court told the jury, "[Y]ou are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. **That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.**" (Emphasis added.) (J.A. 44). The latter sentence told the jury in no uncertain terms that the jury's failure to agree on a sentence of death or life without the possibility of release would result in the court's imposing sentence. Especially following the previously mentioned "lesser sentence" option, a natural inference is that the court's sentence would be such a "lesser sentence."

This inference was strengthened when the District Court told the jury, "In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty." (J.A. 45). The conspicuous absence of the "lesser sentence" option from this statement strongly implied that, in contradistinction to the first two options, the "lesser sentence" option did **not** require jury unanimity and hence would be the result of nonunanimity.[16]

The same impression was given later in the instructions when the jury was told that "Decision Form B

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[16] *Expressio unius est exclusio alterius. See, e.g., Leatherman v. Tarrant County Narcotic Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *TVA v. Hill*, 437 U.S. 153, 188 (1978).

should be used if you **unanimously** recommend that a sentence of death be imposed . . . Decision Form C should be used if you **unanimously** recommend that a sentence of imprisonment for life without the possibility of release should be imposed. Decision Form D should be used if you recommend that some other lesser sentence should be imposed." (Emphasis added.) (J.A. 47). Here again, the requirement of unanimity, explicitly mandated for the death and life without release options, was conspicuously absent from the option of the "lesser sentence" presented on Decision Form D. In light of the omission of the word "unanimously" from the last quoted sentence above, there was at least a reasonable likelihood that the jurors interpreted these instructions to mean that the "lesser sentence" option, unlike death or life imprisonment without release, did not require unanimity – and that, therefore, the "lesser sentence" option would be the result of a lack of unanimity.[17]

Such a conclusion is bolstered by the verdict forms. Decision Form B stated, "[W]e recommend, **by unanimous vote**, that a sentence of death be imposed," and required each of the twelve jurors to individually sign his or her name thereto. (Emphasis added.) (J.A. 57-58). Decision Form C stated, "We the jury recommend, **by unanimous verdict**, a sentence of life imprisonment without the possibility of release," and again required each of the jurors to sign the form individually. (Emphasis added.) (J.A. 58). In contrast, Decision Form D stated "We the jury recommend some other lesser sentence," with no mention

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[17] Indeed, the Court has recognized the reasonableness of such an interpretation in its canon of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation and internal quotation marks omitted).

of unanimity, and required only the signature of the jury foreperson. (J.A. 59). Again, the explicit requirement of jury unanimity for death or life without release – coupled with the conspicuous omission of any mention of unanimity in connection with the "some other lesser sentence" – would certainly have led a reasonable jury to conclude that the "some other lesser sentence" would be the result of a lack of jury unanimity.[18]

The jury was presented with three sentencing verdict options, two of which explicitly required unanimity every time they were mentioned (death or life without release), and one of which did not (the "lesser sentence" option). Furthermore, the jury was never told that it had the option of selecting none of these verdict options and leaving the verdict form incomplete. Indeed, the jury was given quite the opposite impression. It was told that it should use Decision Form A if the government failed to prove the requisite intent or a required aggravating factor; Decision Form B if the jury unanimously recommended a sentence of death; and Decision Forms C or D if (1) the jury did not unanimously agree that the aggravators outweighed the mitigators, (2) the jury did not unanimously agree that the aggravators justified a death sentence if no mitigators had been proved, or (3) **"regardless of [its] findings with respect to aggravating and mitigating factors [the jury was] not unanimous in recommending that a sentence of death should be imposed."** (Emphasis added.) (J.A. 47-48).

Thus, the jury was explicitly told that, if it was not unanimous in recommending that a death sentence should be imposed, it must use either Decision Form C or Decision Form D. But, in the very next sentence, the jury

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[18] The Court of Appeals conceded that "the verdict forms standing alone could have persuaded a jury to conclude that unanimity was not required for the lesser sentence option. . . ." (J.A. 102-103).

was then told that "Decision Form C should be used if you **unanimously** recommend that a sentence of imprisonment for life without the possibility of release should be imposed." (Emphasis added.) (J.A. 48). This meant that Decision Form C was ruled out for a non-unanimous jury – and, since the jury was told that it must select Decision Form C or D, this left only Decision Form D. And, since neither Decision Form D, nor the instructions pertaining to it, required jury unanimity, the jury could quite reasonably have concluded that a deadlock as to penalty would require them to return the verdict form with Decision Form D signed by the jury foreperson.

The Court has recognized that "juries do not leave blanks and do not report themselves as deadlocked . . . unless they are expressly instructed to do so." *Mills v. Maryland*, 486 U.S. 367, 383 (1988). It is thus at least reasonably likely that the jury believed that (1) it had to select at least one of the verdict options; and (2) that the only verdict option available in the case of nonunanimity was the "some other lesser sentence" option of Decision Form D, which might result in petitioner's eventual release from prison.

In fact, there was more than a reasonable likelihood of misinterpretation. As detailed in the two affidavits discussed above, two jurors have stated that the jury **actually** misinterpreted the instructions in the fashion just described.[19] Even without those affidavits, however,

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[19] The Court of Appeals erred in refusing to consider these affidavits. The ban on jury impeachment of verdicts contained in Federal Rule of Evidence 606(b) is not applicable since the Federal Rules of Evidence do not, by their own terms, apply to sentencings. *See* FED. R. EVID. 1101(d)(3). Moreover, this Court has recognized that, although the common law generally disfavors the use of juror affidavits or testimony to impeach a verdict, consideration of such affidavits or testimony may nevertheless be necessary "in the gravest and most important cases," *McDonald v. Pless*, 238 U.S. 264, 269 (1915), where refusal to consider them would "violat[e] the plainest principles of justice." *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851).

The instant case presents just such a case. In light of the fact that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality op.), and in light of the importance of searching appellate review to the constitutional operation of the death penalty, "the plainest principles of justice" require that the Court consider the affidavits in question here.

it is clear that it is at least reasonably likely that the jurors erroneously interpreted the jury instructions and verdict forms as discussed here.

C. The Reasonable Likelihood that the Jury Erroneously Interpreted the Instructions and Verdict Forms in the Fashion Discussed Here Requires Reversal of Petitioner's Death Sentence.

It is thus at least reasonably likely that the instructions and verdict forms created the erroneous – and highly prejudicial – fear that jury nonunanimity would result in a court-imposed less-than-life sentence.[20] Reversal of this sentence is required, both under well-settled principles of federal nonconstitutional law and under the Constitution.

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[20] It has repeatedly been recognized that the fear that a defendant will receive (or serve) less (or significantly less) than a natural life sentence is a major determinant in the capital sentencing jury's decision whether or not to impose a sentence of death. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) (plurality op.); *Brown v. Texas*, ___ U.S. ___, 118 S.Ct. 355, 356 n.2 (1997) (STEVENS, J., respecting the denial of the petition for a writ of certiorari).

1. Nonconstitutional bases for reversal

Under the FDPA, the court of appeals is required to "consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. . . . " 18 U.S.C. § 3595(c)(1). Furthermore, "[w]henever the court of appeals finds that . . . the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor . . . the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death." 18 U.S.C. § 3595(c)(2).

The FDPA's mandated appellate review for "passion, prejudice, or any other arbitrary factor" clearly has its genesis in the identical language in the Georgia death penalty statute approved by the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976).[21] By including the *Gregg* statute's mandatory review for "passion, prejudice, or any other arbitrary factor" in the FDPA, Congress followed numerous state jurisdictions. *See, e.g., State v. Sonnier*, 379 So.2d 1336, 1370 (La. 1980) (on rehearing) ("the Louisiana legislature modeled our present statutes after those approved in *Gregg*"). In adopting the *Gregg* review for arbitrary factors, Congress must also be presumed to have adopted these jurisdictions' judicial interpretations of the term "arbitrary factor."[22] *See Carolene Products Co.*

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[21] *See United States v. Frank*, 8 F.Supp.2d 253, 272 (S.D.N.Y. 1998) ("The FDPA's appellate review provisions closely track those approved in *Gregg*.") Appellate review for "passion, prejudice, or any other arbitrary factor" was a key factor in the Court's holding that the Georgia statute at issue in *Gregg* was constitutional. *See Gregg*, 428 U.S. at 204 & 206 (opinion of Stewart, Powell, & STEVENS, JJ.) & 211-12 & 223-24 (White, J., concurring).

[22] Furthermore, Congress must also be presumed to have adopted another feature of *Gregg*-type mandatory appellate review for "passion, prejudice, or any other arbitrary factor," namely: that such review must be conducted **even where there has been no objection by the defendant**. This was the rule under the very Georgia statute at issue in *Gregg*, *see Zant v. Stephens*, 462 U.S. 862, 880 n.19 (1983) ("The Georgia Supreme Court conducts an independent review of the propriety of the sentence even when the defendant has not specifically raised objections at trial.") (citation omitted); *see also Prevatte v. State*, 233 Ga. 929, 931, 214 S.E.2d 365, 367 (1975); and this is the rule in other *Gregg*-type jurisdictions. *See, e.g., State v. Rhines*, 548 N.W.2d 415, 440 n.3 (N.D.), *cert. denied*, 519 U.S. 1013 (1996); *State v. Osborn*, 102 Idaho 405, 410-11, 631 P.2d 187, 192-93 (1981); *Sonnier*, 379 So.2d at 1371 & n.4.

v. United States, 323 U.S. 18, 26 (1944) ("the general rule [is] that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording.") (citations omitted). And it is clear from other *Gregg* jurisdictions that instructional errors may constitute "arbitrary factors" requiring an appellate court to reverse under the "passion, prejudice, or any other arbitrary factor" review. *See, e.g., Parker v. State*, 887 P.2d 290, 299 (Okla. Crim. App. 1994); *State v. Brown*, 414 So.2d 689, 699-701 (La. 1982).

Particularly, several courts have found that jury instructions or prosecutorial arguments which cause a jury to speculate that, if they do not impose a death sentence, the defendant may one day be released, constitute an "arbitrary factor" mandating reversal of the death sentence. *See, e.g., Williams v. State*, 544 So.2d 782, 796-99 (Miss. 1989) (on rehearing); *Williams v. State*, 445 So.2d 798, 813 (Miss. 1984), *cert. denied*, 469 U.S. 1117 (1985); *Brown*, 414 So.2d at 699-701; *State v. Lindsey*, 404 So.2d 466, 485-87 (La. 1981). The concerns underlying these cases are exacerbated when the jury is given inaccurate, incomplete, or misleading information about the possibilities of a defendant's future release. *See, e.g., Jones v.*

State, 101 Nev. 573, 580-82, 707 P.2d 1128, 1133-34 (1985); *Sonnier*, 379 So.2d at 1371-72.

The Court should follow the lead of these jurisdictions (as Congress presumably intended) and find that the reasonable likelihood of juror misinterpretation of the jury instructions constitutes an "arbitrary factor" under the FDPA requiring reversal of petitioner's death sentence. The Louisiana Supreme Court has explained why this should be so:

> When a jury's attention is diverted from its primary responsibility of weighing the circumstances of the crime and the character and propensities of the offender and thrust into speculation about the future actions of as yet unknown actors, a serious possibility arises that each death sentence imposed under such conditions is the result of an interjection of an unquantifiable factor into the deliberation process, thereby rendering the decision arbitrary . . . . In addition, the journey into this speculatory exercise necessarily raises the possibility that the jury will be motivated to act out of fear of the unknown possibility that the defendant might return to society, thereby compounding the risk of arbitrariness.

Lindsey, 404 So.2d at 487. Here, the jury's "error of law concerning the available sentencing options must be construed as an arbitrary factor, which has a negative impact on the validity of the death sentence." *Allen v. State*, 821 P.2d 371, 376 (Okla. Crim. App. 1991). The Court should therefore reverse petitioner's sentence as imposed as the result of an "arbitrary factor" under § 3595(c)(2)(A) of the FDPA.

Reversal should also follow as a matter of the authority for error correction conferred by 18 U.S.C. § 3595(c)(2)(C), or, alternatively, simply as a matter of the Court's role as supervisor of the lower federal courts. In

Bollenbach v. United States, 326 U.S. 607 (1946), the Court, acting in this capacity, reversed a federal conviction obtained on the basis of a defective jury charge. In so doing, the Court noted that "[a] charge should not be misleading," *id.* at 614 (citation omitted), and that "[a] conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Id.* at 613.

Indeed, the Court has, on the basis of these very principles, reversed a federal death sentence imposed under instructions that may have misled the jury about the consequences of failing to reach a unanimous sentencing decision. *See Andres v. United States*, 333 U.S. 740 (1948). Under the federal statutes at issue in *Andres*, the jury's verdict of guilt would normally mean that the defendant would be put to death; however, the jury also had the option of "qualifying" their verdict by adding "without capital punishment." The Court first interpreted the statutes at issue to hold that a death sentence would only result if the jury were unanimous in rejecting a "without capital punishment" qualification. *See Andres*, 333 U.S. at 748-49. The Court then turned to the question "whether the instructions given by the trial judge clearly conveyed to the jury a correct understanding of the statute." *Id.* at 749. The Court held that the jurors might reasonably – but erroneously – have thought that failure to achieve unanimity on a "without capital punishment" qualification required the return of an unqualified verdict, resulting in a death sentence. *Id.* at 752. Holding that "[i]n death cases doubts such as those presented here should be resolved in favor of the accused," the Court reversed. *Id.*

Here, as in *Andres*, there is at least a reasonable likelihood that the death sentence was the result of a critical inaccuracy in the jury instructions. Resolving

those doubts in favor of petitioner, as *Andres* requires, the Court should reverse petitioner's death sentence.[23]

2. Constitutional bases for reversal

Because there was at least a reasonable likelihood that petitioner's death sentence was imposed on the basis of inaccurate information, that sentence violates the Eighth Amendment. The Eighth Amendment "mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189 (opinion of Stewart, Powell, and STEVENS, JJ.). This discretion must "be exercised in an informed manner." *Id.* Thus, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Id.* at 190.

Indeed, the Court has repeatedly stressed that the touchstone of Eighth Amendment claims like this one is whether the information given to the capital sentencing jury is **accurate**. *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 9-10 (1994) & *id.* at 14-15 (O'CONNOR, J., concurring); *Caldwell v. Mississippi*, 472 U.S. 320, 336 (1985) (plurality op.) & *id.* at 341-43 (O'CONNOR, J., concurring in part

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[23] Relatedly, it is well established that a superior court may, in the exercise of its supervisory role, remand to a lower court for resentencing when there is even a possibility that the sentencer misunderstood its sentencing options. *See, e.g., United States v. Stewart*, 779 F.2d 538, 541 (9th Cir. 1985) (KENNEDY, J.) (vacating sentence and remanding for resentencing where there was a possibility that judge imposed sentence of life without parole based upon mistaken advice from the government that defendant would nevertheless be eligible for parole after serving only ten years of his sentence).

and concurring in the judgment). The Court has not hesitated to find an Eighth Amendment violation where, as here, the jury is given inaccurate information. *See, e.g., Caldwell, id.; cf. Johnson v. Mississippi*, 486 U.S. 578, 585-87 & 590 (1988) (Eighth Amendment violated where capital sentencing jury allowed to consider "materially inaccurate" evidence of prior conviction which was later vacated).

Here, there is no dispute that petitioner could not receive less than life without parole for the crime of which he was convicted. Thus, because it is at least reasonably likely that the jury misinterpreted its instructions and the verdict forms to mean that petitioner would receive some lesser sentence if the jury deadlocked on the penalty recommendation, it is likewise reasonably likely that petitioner was sentenced to death on the basis of inaccurate information in violation of the Eighth Amendment.[24]

The reasonable likelihood that petitioner was sentenced to death on the basis of the jury's erroneous assumptions about the effect of a jury deadlock also violated the Fifth Amendment's guarantee of due process. The Court has long recognized that sentences based on "assumptions . . . which [are] materially untrue" or "on a

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[24] The erroneous jury instructions effectively forced jurors who might have considered a sentence of life imprisonment into an unconstitutional all-or-nothing choice between death and a less-than-life sentence. *Cf. Beck v. Alabama*, 447 U.S. 625, 642-43 (1980) (striking on Eighth Amendment grounds an Alabama procedural rule that forbade the giving of a lesser included offense instruction in a capital case, on the ground that forcing the jury into an all-or-nothing choice between conviction for a capital offense and outright acquittal "interject[ed] irrelevant considerations into the factfinding process," thereby "introduc[ing] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case").

foundation [which is] extensively and materially false" violate due process. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). This principle applies with even greater force in the capital sentencing context, where the necessity of accurate sentencing information is reinforced by the Eighth Amendment requirement of "heightened reliability" in the imposition of death sentences. Accordingly, the Court should reverse petitioner's death sentence.

II. PETITIONER WAS ENTITLED TO A JURY INSTRUCTION THAT THE JURY'S FAILURE TO AGREE ON A SENTENCING RECOMMENDATION WOULD RESULT IN A COURT-IMPOSED SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE.[25]

The District Court erred in denying petitioner's requested instruction (J.A. 14-15) that the result of jury deadlock on the sentencing recommendation would be a court-imposed sentence of life without release. First, contrary to the holding of the Court of Appeals, such an instruction correctly states the law. Second, the instruction was required, not only as a matter of affirmative right, but also, under the circumstances of this case, to correct the erroneous and highly prejudicial impression which the other instructions gave: namely, that jury deadlock would result in some court-imposed sentence **less** than life imprisonment.

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[25] As previously discussed, if the Court grants petitioner relief on the narrower question previously discussed, the Court need not reach this potentially more far-reaching question. *See* footnote 9, *supra*.

A. Under the FDPA as Applied to this Case, Jury Deadlock Would Have Resulted in a Court-Imposed Sentence of Life Imprisonment Which was Perforce Without the Possibility of Parole or Release.

The Court of Appeals agreed that, as this jury went into the sentencing hearing, there were only two sentencing options available: death, or life imprisonment which was, perforce, without the possibility of parole or release. (J.A. 110). The Court of Appeals nevertheless found no error in the District Court's refusal to give petitioner's requested instruction on the effect of jury nonunanimity, because the Court of Appeals found that the instruction was not a correct statement of the law. Particularly, the Court of Appeals held that, contrary to petitioner's argument, jury deadlock on the penalty recommendation would not result in a court-imposed sentence of life imprisonment because "the Federal Death Penalty Act requires the jury to achieve unanimity or no verdict results." (J.A. 103). The Court of Appeals thus apparently accepted the government's argument that a hung jury in the sentencing phase would require a new sentencing hearing.[26]

Contrary to this ruling, a "mistrial" and a new sentencing hearing are not permissible options where the sentencing jury deadlocks as to the appropriate punishment. While the FDPA does admonish that, after weighing the aggravating factors against any mitigating factors, "the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to

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[26] Notably, this argument did not make its debut until the appellate stage. At the trial stage, the government had expressed the view that jury nonunanimity would result in court sentencing. *See* Government's Response to Defendant's Motion for New Trial (J.A. 73).

life imprisonment without possibility of release or some other lesser sentence," 18 U.S.C. § 3593(e), this provision does not, however, speak to the case where the jury cannot arrive at a unanimous sentencing decision.

Rather, the jury deadlock situation is covered by the very next section of the FDPA, which provides that

> Upon a [unanimous] recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. **Otherwise, the court shall impose any lesser sentence that is authorized by law.** Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

18 U.S.C. § 3594 (emphasis added).

The meaning of § 3594 could not be any plainer. If the jury unanimously recommends death or life without release, the court is required to impose those sentences. "Otherwise" – *i.e.*, **in any other case** – the duty of sentencing devolves upon the court. The "otherwise" clause thus plainly encompasses not only the scenario of a unanimous recommendation for a lesser sentence, but also the scenario of a jury deadlocked over the penalty recommendation.

"[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citation omitted). Lest there remain any doubt, however, the legislative history of the FDPA confirms that petitioner's interpretation of § 3594 is the correct one. In the Judiciary Committee's Report on House Bill No. 4035, the Committee, in its section-by-section analysis of the identical language at issue here, explained as follows:

> Subsection 3593(e) requires the sentencer to consider whether all the aggravating factors found to exist sufficiently outweigh any mitigating factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factors alone are sufficient to justify a sentence of death. Based upon this consideration, a unanimous jury, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release, or to some lesser sentence. **If the jury is not unanimous, the judge shall impose the sentence pursuant to Section 3594.**

H.R. REP. NO. 103-467, at 9 (1994), *available in* 1994 WL 107578, at 26 (emphasis added). Given that Committee Reports on a bill are the type of legislative history viewed as most "authoritative" by the Court, *see Garcia v. United States*, 469 U.S. 70, 76 (1984), this very clear statement about the effect of jury nonunanimity demonstrates that the Court of Appeals was wrong in holding that a deadlocked jury would require sentencing by a new jury.

In sum, petitioner's requested jury instruction was substantively correct: a failure by the jury to unanimously vote for the death penalty would have resulted in a sentence of life imprisonment without the possibility of parole or release for petitioner.[27]

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[27] To be sure, this will not always be the case under § 3594. Many potential death penalty offenses permit alternative penalties of, not only life imprisonment, but also lesser penalties. *See, e.g.*, 18 U.S.C. § 242; 18 U.S.C. § 844(d).

B. The Failure to Give Such an Instruction Requires Reversal of Petitioner's Death Sentence.

Petitioner was entitled to an instruction on the effect of nonunanimity, both as a matter of affirmative right and also in order to correct the erroneous impression (created by the instructions actually given) that nonunanimity on the sentencing recommendation would result in a court-imposed sentence of less than life imprisonment. Petitioner's entitlement to this instruction rests on both nonconstitutional and constitutional grounds.

1. Nonconstitutional bases for reversal

First, the failure to give the instruction at issue here created an "arbitrary factor," vitiating the death sentence and requiring reversal under 18 U.S.C. § 3595(c)(2). In other "arbitrary factor" jurisdictions, courts have recognized that the need to prevent death sentences returned as a result of "arbitrary factors" requires an instruction accurately describing the possible sentences. *See, e.g., Parker,* 887 P.2d at 299; *Sonnier,* 379 So.2d at 1371-72. In a similar vein, courts have recognized that, where jury nonunanimity results in the imposition of a particular non-death sentence, the jury must be informed of that fact in order to avoid the arbitrary and capricious imposition of the death penalty based on speculation as to what the consequences of deadlock might be.[28] "[B]y allowing

[28] *See, e.g., State v. Williams,* 392 So.2d 619, 633-35 (La. 1980) (on rehearing); *Whalen v. State,* 492 A.2d 552, 562 (Del. 1985); *State v. Ramseur,* 106 N.J. 123, 308-12, 524 A.2d 188, 282-84 (1987). Although *Williams* and *Whalen* rely on the Eighth Amendment's prohibition of the arbitrary and capricious imposition of the death penalty, their reasoning applies *a fortiori* where, as here, a statutory scheme forbids the imposition of the death penalty under the influence of any "arbitrary factor." *Cf.*

the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court fail[s] to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action." *Williams,* 392 So.2d at 634-35. "To hide from the jury the full range of its sentencing options, thus permitting its decision to be based on uninformed and possibly inaccurate speculation, is to mock the goals of rationality and consistency required by modern death penalty jurisprudence." *Ramseur,* 106 N.J. at 311, 524 A.2d at 284.

The requested instruction was all the more necessary here, in order to correct the jury's mistaken – and highly damaging – belief that their failure to achieve unanimity would result in a less-than-life sentence. Inasmuch as the erroneous instructions interjected an "arbitrary factor" into these proceedings, the failure to give the corrective instruction perpetuated that arbitrariness, and likewise requires reversal under the FDPA.

The failure to give this corrective instruction also constitutes reversible error which is cognizable both under the FDPA's error correction prong (18 U.S.C. § 3595(c)(2)(C)) and in this Court's capacity as supervisor of the lower federal courts. The Court has previously reversed a federal conviction on the latter basis where a district court failed to give an accurate supplemental instruction to clear up jury confusion about the meaning of the court's charge. *See Bollenbach,* 326 U.S. at 610-15. The Court noted that, where difficulties in the charge are brought to the court's attention, "a trial judge should clear them away with concrete accuracy." *Id.* at 612-13. Especially since "[i]n death cases doubts such as those

Ramseur, 106 N.J. at 308-11, 524 A.2d at 282-83 (agreeing with *Williams* and *Whalen,* but adopting rule under supervisory power, not as constitutional mandate).

presented here should be resolved in favor of the accused," *Andres*, 333 U.S. at 752, the Court should hold that the failure to give the instruction at issue requires reversal of petitioner's death sentence.

2. Constitutional bases for reversal

Reversal of petitioner's sentence is required as a matter of constitutional law as well. The failure affirmatively to inform a capital sentencing jury about the consequences of nonunanimity in their sentencing recommendation renders a death sentence arbitrary and capricious in violation of the Eighth Amendment.[29] But the Court need not hold that such an instruction is required in every case in order to rule for petitioner here.

Because the instructions actually given created the inaccurate impression that a lack of unanimity would result in a less-than-life sentence imposed by the court, the failure to give this instruction left the jury critically misinformed about the consequences of their failure to agree. Under these circumstances, the Eighth Amendment required that petitioner's requested instruction be given. As Justice Souter has noted, "[W]henever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been 'arbitrarily or discriminatorily' and 'wantonly and . . . freakishly imposed.' " *Simmons v. South Carolina*, 512 U.S. 154, 172-73 (1994) (SOUTER, J., concurring) (citations omitted). Petitioner's death sentence should

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[29] *See* authorities cited in Section II.B.1. and footnote 28, *supra*.

therefore be reversed as violative of the Eighth Amendment.[30]

In sum, it is at least reasonably likely that the jury labored under a critical misunderstanding of the consequences of jury nonunanimity. Because the Court has insisted that capital sentences must be reliable and based on accurate information, the Court should reverse petitioner's death sentence and remand to the Court of Appeals with instructions to "remand the case for reconsideration under section 3593 or imposition of a sentence other than death." 18 U.S.C. § 3595(c)(2).

III. THE SUMMARY ASSERTION OF HARMLESS ERROR BY THE COURT OF APPEALS, WITHOUT ANY ANALYSIS OR EXPLANATION BASED UPON THE RECORD, REQUIRES REVERSAL.

A. Introduction

In a weighing scheme like the FDPA, aggravating factors not only narrow the class of defendants **eligible** for the death penalty, but also guide the jury's decision on whether to **impose** the death penalty. *See Stringer v.*

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[30] The refusal to give the instruction at issue here is also a "procedural rule that ten[ds] to diminish the reliability of the sentencing determination" under *Beck v. Alabama*, 447 U.S. 625, 638 (1980). *Cf. Simmons*, 512 U.S. at 172-74 (SOUTER, J., concurring). Additionally, to the extent that the instructions actually given created an impermissible "all-or-nothing" choice like that condemned in *Beck*, the failure to give the corrective instruction perpetuated that error. *See* footnote 24, *supra*. Finally, the failure to give the corrective instruction meant that, on the basis of the misleading instructions actually given, petitioner was very likely sentenced to death based on "assumptions . . . which were materially untrue" or "on a foundation [which was] extensively and materially false," in violation of due process. *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Black, 503 U.S. 222, 234-35 (1992). Under the FDPA, the sentencer must balance each aggravating factor found to exist against each mitigating factor found to exist; the jury may sentence the defendant to death only if all the aggravating factors found to exist outweigh all the mitigating factors found to exist. *See* 18 U.S.C. § 3593(e).

Although the Court of Appeals found that the jury in this case had relied upon two invalid nonstatutory aggravating factors in the weighing process, (J.A. 117-119), that court did not reverse and remand for a new sentencing hearing. Instead, the court summarily asserted that the error was harmless since the verdict would have been the same absent the invalid aggravating factors. (J.A. 122-123).

In making such a conclusory finding of harmless error, the Court of Appeals ignored 18 U.S.C. § 3595(c), which allows appellate courts to find "harmless error" only when the "Government establishes beyond a reasonable doubt that the error was harmless." The Court of Appeals also misapplied this Court's precedents which clearly require that, where an invalid aggravating factor is submitted to the jury, the reviewing court must make "a detailed explanation based on the record" to support a finding of harmless error. *Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *see also Stringer*, 503 U.S. at 230 (requiring "a thorough analysis of the role an invalid aggravator played in the sentencing process"); *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'CONNOR, J., concurring) ("bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion").

The Court of Appeals did not discuss the aggravating and mitigating evidence, nor did it assess the weight the jury might have given to that evidence. Most significantly, the Court of Appeals did not discuss the eleven mitigating factors found by one or more jurors or the wealth of evidence that supported the findings of those mitigating factors. Instead, the Court of Appeals merely

asserted that the two valid aggravating factors "support[ed]" the sentence of death. Because the Court of Appeals asserted "harmless error" in the absence of "a principled explanation of how the court reached that conclusion," *Sochor, id.* at 541 (O'CONNOR, J., concurring), in violation of both § 3595 and the Constitution, petitioner's death sentence must be reversed.

B. The Court of Appeals Did Not Perform the Harmless Error Analysis Intended by Congress.

Under a weighing statute like the FDPA, where a sentencer relies upon an invalid aggravating factor or factors, the sentence itself is invalid and must be reversed, unless the reviewing court either reweighs the valid aggravating factors against the mitigating evidence or conducts harmless error analysis.[31] *See Clemons*, 494 U.S. at 741. In § 3595(c) of the FDPA, Congress specifically selected the latter option: "The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless."

Section 3595(c) thus incorporates the harmless-beyond-a-reasonable-doubt standard first articulated by the Court in *Chapman v. California*, 386 U.S. 18 (1967): namely, whether the government has proved beyond a reasonable doubt that the jury would have imposed a sentence of death had the two invalid factors not been

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[31] Although the Court has never precisely delineated the differences between the two concepts, they clearly are different. Harmless error analysis focuses on what a properly instructed jury would have done; reweighing on appeal permits the appellate court to make its own judgment after reweighing the remaining valid aggravating factors against the mitigating factors.

submitted, or, put another way, whether there is a reasonable possibility that the error might have contributed to the verdict. *See Chapman*, 386 U.S. at 24. In this case, that standard requires that, because there is a reasonable possibility that one or both of the invalid aggravating factors contributed to the verdict, the sentence must be reversed.

It is especially important that a reviewing court confronted with the problem of erroneous submission of invalid aggravating factors make a detailed review of the entire record. The Eighth Amendment guarantees to a capital defendant an "individualized determination" of his sentence, and the Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991). Moreover, Congress explicitly recognized the importance of appellate review under this statute. *See, e.g.*, 18 U.S.C. § 3595(c)(1) (court of appeals "shall address all substantive and procedural issues raised" on appeal). No doubt wishing to effectuate the Eighth Amendment's requirement of individualized sentencing, Congress plainly intended that harmless error review under the FDPA be conducted with at least the kind of detailed and thorough analysis and explanation required by *Clemons*, *Parker*, and *Sochor*.

The standard for harmless error review under the FDPA, then, is **not** whether a death sentence would have been **authorized** if there remain valid aggravating factors after removing any invalid aggravating factors.[32] Nor is the standard whether the court of appeals, in the exercise

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[32] Because a capital defendant is entitled under the Eighth Amendment to an individualized determination of his sentence, an appellate court in a weighing jurisdiction cannot rely upon the fact that there remain valid aggravating factors and thereby automatically affirm a death sentence. *See Clemons*, 494 U.S. at 752; *Richmond v. Lewis*, 506 U.S. 40, 46 (1992); *Stringer*, 503 U.S. at 229-32.

of its own judgment, would consider death an **appropriate** sentence. The only way to conduct a proper harmless error review under the FDPA is to make a detailed explanation based upon the record as to why the jury would have imposed the same sentence absent the invalid aggravating factors. At a minimum, this requires a detailed explanation of the Court of Appeals' analysis and an articulation of how much weight it believed the jury assigned to each aggravating and mitigating factor.[33]

It is true that the Court of Appeals used the phrase "harmless error," and the court stated that the death sentence would have been imposed "had the invalid aggravating factors never been submitted to the jury." (J.A. 123). However, the court offered no explanation as to how it reached that conclusion. Proper harmless error analysis would have required the court to explain why the jurors would have reached the same result had they weighed the two remaining aggravating factors against the mitigating factors. But the court did not discuss the mitigating evidence at all, other than a bare reference to

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[33] For example, the Tennessee Supreme Court has held:

> In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.

State v. Howell, 868 S.W.2d 238, 260-61 (Tenn. 1993) (footnote omitted), *cert. denied*, 510 U.S. 1215 (1994).

"the eleven mitigating factors found by one or more jurors." (J.A. 122). The Court held in *Clemons* that:

> because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence.

Clemons, 494 U.S. at 752. Similarly, in *Parker v. Dugger*, this Court emphasized the importance of considering mitigating evidence in conducting harmless error analysis: "Following *Clemons*, a reviewing court is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer actually found. **What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record. . . .** " *Parker*, 498 U.S. at 320 (emphasis added). *See also Richmond v. Lewis*, 506 U.S. at 49 (state supreme court did not "even mention the evidence in mitigation").

Remarkably, the Fifth Circuit's opinion is **completely silent** with respect to the particulars of petitioner's mitigating evidence. In fact, there was an extraordinary amount of mitigating evidence in this case. Petitioner served for twenty-two years in the United States Army, retiring with an honorable discharge as a Master Sergeant in the Army Airborne Rangers. He served with distinction in two foreign conflicts, and was awarded a Meritorious Service Award and a Commendation Medal. And, the jury found that, unlike most capital defendants, "[petitioner] did not have a significant prior criminal record." (J.A. 54). The jury also found that petitioner's daughter would suffer emotional trauma if her father was executed, and that petitioner was remorseful and would likely be a well-behaved inmate. (J.A. 55)

Moreover, despite a horrible and traumatic childhood, which included regular sexual and physical abuse, petitioner managed, against overwhelming odds, to lead a successful and productive adult life. The defense offered compelling expert testimony of brain damage and psychiatric and psychological disorders, which combined to severely impair petitioner's ability to control his impulses on the night of the murder. And, the jury not only found that petitioner had proved **every** mitigating factor that he had submitted, but also found that petitioner's ex-wife was an additional mitigating factor. (J.A. 54-56).

In conducting harmless error analysis, the reviewing court should not ignore any of the mitigating factors that the jury found, or substitute its judgment for that of the jurors who found those mitigating factors. The fact that all jurors did not find these factors is irrelevant. The FDPA explicitly provides that if one juror finds that the defendant has proved a mitigating factor, that factor must be considered as part of the weighing process.[34] *See* 18 U.S.C. § 3593(d). Because the Court of Appeals mentioned none of this evidence in its summary conclusion that the error was harmless, the Court of Appeals did not perform

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[34] Because each juror makes an individual finding as to whether each mitigating factor has been proved, and because a sentence of death must be unanimous, the court of appeals should consider any mitigating factor found by at least one juror when determining whether the jury would have sentenced the defendant to death absent the invalid aggravating factors. *Cf. Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993) (in discussing materiality of *Brady* claims, holding that "given the unanimity required at the Louisiana punishment phase, the proper frame of reference . . . is whether the mind of one juror could have been changed with respect to the imposition of the sentence of death").

the harmless error analysis required by § 3595 and by the Eighth Amendment.

C. The Court of Appeals Incorrectly Assumed that Because the Invalid Aggravating Factors Were Nonstatutory, They Were Not Important in the Jury's Deliberations.

The Court of Appeals incorrectly assumed that, because the invalid aggravating factors in this case were "nonstatutory" rather than "statutory," those factors were not important in the jury's deliberations. In the one paragraph in which it discussed whether the error was harmless, the Court of Appeals emphasized that the two statutory aggravating factors found by the jury were valid:

> [I]f the jury had failed to find at least one of the statutory aggravating factors beyond a reasonable doubt, then the deliberations would have ceased leaving the jury powerless to recommend the death penalty. Therefore the ability of the jury to recommend the death penalty hinged on a finding of at least one statutory aggravating factor. Conversely, jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty. (J.A. 122).

The court concluded that the two remaining aggravating factors "support[ed]" the sentence of death.[35] (J.A. 122).

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[35] The use of the verb "support" indicates that the Court of Appeals answered the wrong question, namely, whether the jury legally **could** sentence petitioner to death. The question the Court of Appeals did not answer, the one it was legally obligated to answer, was whether the jury **would** have sentenced petitioner to death absent the invalid aggravating factors.

Although a death sentence is not authorized unless the jury finds at least one statutory aggravating factor, once the jury does find a statutory aggravating factor, **all** aggravating factors that the jury finds to be proved must be weighed in the decisional process. Once the jury found one statutory aggravating factor, it was legally obligated to make no distinction between "statutory" and "nonstatutory" aggravating factors. The jurors were instructed that they "**must** weigh **any** aggravating factors that [they] unanimously f[ound] to exist – **whether statutory or nonstatutory**. . . . " (J.A. 43) (emphasis added).

Contrary to the lower court's assumption, therefore, nonstatutory aggravating factors can have a profound impact under the FDPA, because they are weighed alongside statutory aggravating factors in the decision between life and death. In this weighing process, jurors may choose to assign greater weight to a nonstatutory aggravating factor than to any or all of the remaining statutory aggravating factors and mitigating factors in the case. The FDPA quite specifically requires that the jury consider each aggravating factor that it finds beyond a reasonable doubt (and the judge so instructed the jury in this case). The Court of Appeals erred in concluding that the two invalid aggravating factors did not affect the verdict.

D. The Proper Remedy is to Remand for a New Sentencing Before a Jury.

Because the Court of Appeals failed to articulate the basis of its conclusion that the error was harmless, the sentence must be reversed. Moreover, on the record in this case, it is simply not possible to conclude beyond a reasonable doubt that the jury would have sentenced the defendant to death without the submission of the two invalid aggravating factors. Accordingly, the proper remedy on this record is not to remand to the Court of

Appeals to conduct harmless error analysis. Instead, the case should be remanded for a new sentencing hearing before a jury. *See* 18 U.S.C. § 3595(c)(2).

Had the Court of Appeals actually conducted proper harmless error analysis, the record in this case could not support a finding beyond a reasonable doubt that a properly instructed jury, not relying upon the two invalid aggravating factors, would have reached the same decision. This was a close and difficult decision for the jurors. First, the jury's refusal to find several of the aggravating factors submitted by the government indicates that the jury's decision was anything but a foregone conclusion.[36] Moreover, even with the two invalid aggravating factors weighed in the balance, the jury still deliberated for a day and a half. The two juror affidavits provide a window into how difficult and close the decision was. And, as shown above, the jury was instructed erroneously about the consequences if the jury was not unanimous as to either death or life without possibility of release. This error further skewed the deliberations, and makes it especially difficult to rely upon the jury's actual verdict to speculate whether a properly instructed jury would have reached the same decision.

In short, the record in this case makes harmless error analysis "extremely speculative or impossible." *See Clemons*, 494 U.S. at 754 (noting that an appellate court "may conclude that peculiarities in a case make appellate reweighing or harmless-error analysis extremely speculative or impossible"). Accordingly, the Court should

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[36] The jury refused to find that petitioner committed the offense after substantial planning and premeditation; it refused to find that he knowingly created a grave risk of death to one or more persons in addition to the victim; and it refused to find that petitioner constitutes a future danger to the lives and safety of other persons. (J.A. 51-53).

reverse the judgment of the Court of Appeals and remand for a new sentencing hearing before a jury.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

18 U.S.C. § 1201(a)

§ 1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when –

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or

(5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties;

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

APPENDIX B

18 U.S.C. §§ 3591-3598

§ 3591. Sentence of death

(a) A defendant who has been found guilty of –

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593 –

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing

held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

(b) A defendant who has been found guilty of –

(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or

(2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

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§ 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified

(a) Mitigating factors. – In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

> **(1) Impaired capacity.** – The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
>
> **(2) Duress.** – The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.
>
> **(3) Minor participation.** – The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.
>
> **(4) Equally culpable defendants.** – Another defendant or defendants, equally culpable in the crime, will not be punished by death.
>
> **(5) No prior criminal record.** – The defendant did not have a significant prior history of other criminal conduct.

> **(6) Disturbance.** – The defendant committed the offense under severe mental or emotional disturbance.
>
> **(7) Victim's consent.** – The victim consented to the criminal conduct that resulted in the victim's death.
>
> **(8) Other factors.** – Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

(b) Aggravating factors for espionage and treason. – In determining whether a sentence of death is justified for an offense described in section 3591(a)(1), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

> **(1) Prior espionage or treason offense.** – The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law.
>
> **(2) Grave risk to national security.** – In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security.
>
> **(3) Grave risk of death.** – In the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(c) Aggravating factors for homicide. – In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Death during commission of another crime. – The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 36 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section 1201 (kidnapping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy).

(2) Previous conviction of violent felony involving firearm. – For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.

(3) Previous conviction of offense for which a sentence of death or life imprisonment was authorized. – The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(4) Previous conviction of other serious offenses. – The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(5) Grave risk of death to additional persons. – The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

(6) Heinous, cruel, or depraved manner of committing offense. – The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(7) Procurement of offense by payment. – The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(8) Pecuniary gain. – The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(9) Substantial planning and premeditation. – The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

(10) Conviction for two felony drug offenses. – The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(11) Vulnerability of victim. – The victim was particularly vulnerable due to old age, youth, or infirmity.

(12) Conviction for serious Federal drug offenses. – The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(13) Continuing criminal enterprise involving drug sales to minors. – The defendant committed the offense in the course of engaging in a continuing criminal enterprise in

violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859).

(14) High public officials. – The defendant committed the offense against –

> **(A)** the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;
>
> **(B)** a chief of state, head of government, or the political equivalent, of a foreign nation;
>
> **(C)** a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or
>
> **(D)** a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution –
>
> > **(i)** while he or she is engaged in the performance of his or her official duties;
> >
> > **(ii)** because of the performance of his or her official duties; or
> >
> > **(iii)** because of his or her status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

(15) Prior conviction of sexual assault or child molestation. – In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation.

(16) Multiple killings or attempted killings. – The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(d) Aggravating factors for drug offense death penalty. – In determining whether a sentence of death is justified for an offense described in section 3591(b), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Previous conviction of offense for which a sentence of death or life imprisonment was authorized. – The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

(2) Previous conviction of other serious offenses. – The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(3) Previous serious drug felony conviction. – The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

(4) Use of firearm. – In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

(5) Distribution to persons under 21. – The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 418 of the Controlled Substance Act (21 U.S.C. 859) which was committed directly by the defendant.

(6) Distribution near schools. – The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct

proscribed by section 419 of the Controlled Substances Act (21 U.S.C. 860) which was committed directly by the defendant.

(7) Using minors in trafficking. – The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act (21 U.S.C. 861) which was committed directly by the defendant.

(8) Lethal adulterant. – The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

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§ 3593. Special hearing to determine whether a sentence of death is justified

(a) Notice by the government. – If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of

guilty, sign and file with the court, and serve on the defendant, a notice –

> **(1)** stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
>
> **(2)** setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) Hearing before a court or jury. – If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted –

> **(1)** before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if –

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

(c) Proof of mitigating and aggravating factors. – Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial

judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues or misleading the jury. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

(d) Return of special findings. – The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special

findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) Return of a finding concerning a sentence of death. – If, in the case of –

> **(1)** an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist;
>
> **(2)** an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or
>
> **(3)** an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist,

the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a

sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

(f) Special precaution to ensure against discrimination. – In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

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§ 3594. Imposition of a sentence of death

Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

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§ 3595. Review of a sentence of death

(a) Appeal. – In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

(b) Review. – The court of appeals shall review the entire record in the case, including –

(1) the evidence submitted during the trial;

(2) the information submitted during the sentencing hearing;

(3) the procedures employed in the sentencing hearing; and

(4) the special findings returned under section 3593(d).

(c) Decision and disposition. –

(1) The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death, and shall consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the special finding of the existence of an aggravating factor required to be considered under section 3592.

(2) Whenever the court of appeals finds that –

(A) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(B) the admissible evidence and information adduced does not support the special finding of the existence of the required aggravating factor; or

(C) the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure,

the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death. The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government

establishes beyond a reasonable doubt that the error was harmless.

(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

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§ 3596. Implementation of a sentence of death

(a) In general. – A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

(b) Pregnant woman. – A sentence of death shall not be carried out upon a woman while she is pregnant.

(c) Mental Capacity. – A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental

capacity to understand the death penalty and why it was imposed on that person.

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§ 3597. Use of State facilities

(a) In general. – A United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.

(b) Excuse of an employee on moral or religious grounds. – No employee of any State department of corrections, the United States Department of Justice, the Federal Bureau of Prisons, or the United States Marshals Service, and no employee providing services to that department, bureau, or service under contract shall be required, as a condition of that employment or contractual obligation, to be in attendance at or to participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee. In this subsection, "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

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§ 3598. Special provisions for Indian country

Notwithstanding sections 1152 and 1153, no person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction.